IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1410

JOEL EDELMAN, DIRECTOR OF ILLINOIS DEPARTMENT OF PUBLIC AID, et al.,

Petitioners,

v.

JOHN JORDAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The monetary award made by the District Court is wrongfully characterized by Respondents as "equitable restitution". The award is in the nature of a statutory entitlement barred by the Eleventh Amendment. It is elementary that unjust enrichment is a prerequisite for a finding of restitution. Unjust enrichment is not present in this case.

Illinois did not waive its Eleventh Amendments rights of immunity from suit either expressly or impliedly by its participation in the welfare assistance program. Nor did Illinois waive such rights, as the Illinois Attorney General had no power to waive the State's right to Eleventh Amendment protection.

Respondents' rights arise not under Title 42 U.S.C. 1983, but under the Social Security Act. That act did not create an express or implied right to retroactive assistance, nor does it require a waiver of the Eleventh Amendment prohibition.

Respondents present no case in which statutory rights have taken precedence over Eleventh Amendment rights absent an express or implied waiver. Citation of cases in which constitutional guarantees have taken precedence over Eleventh Amendment rights are beside the point. The financial "impact" argument of Respondents is no more than a "straw man" to be knocked down.

THE CHARACTERIZATION OF RETROACTIVE BENEFITS AS RESTITUTION HAS NO BASIS IN THE TRADITIONAL PRINCIPLES OF EQUITY JURISPRUDENCE.

The relief sought by the Respondents cannot be characterized as equitable restitution. The Respondents' statement that your Petitioner placed the label of "damages" on the relief is mistaken. Your Petitioner's theory has been and continues to be that the relief granted by the District Court is a "monetary award" contravening the prohibition of the Eleventh Amendment.

It is a fundamental principal of equity jurisprudence that a chancellor will always look to the substance of a

transaction as opposed to its form. *People ex rel. Barrett* v. *Fritz,* (1942) 316 Ill. App. 217, 45 N.E. 2d 48; *Knights* v. *Knights* (1922), 300 Ill. 618, 133 N.E. 377; and *Addive* v. *Grange* (1935), 358 Ill. 127, 192 N.E. 774. Hence, a retroactive monetary award against Illinois may not be viewed in the light of a label; nor may a label change the immediate principles of constitutional law.

Your Petitioner respectfully submits that the granting of "payments alleged wrongfully withheld" is not equitable restitution. A contrary conclusion would compel a substantial expansion of the parameters of the fiction of *Ex Parte Young,* 209 U.S. 123 (1907).

A proper analysis of the nature of "release of benefits wrongfully withheld" requires a finding that it is in the nature of an enforcement of an obligation imposed by statute, or in this instance a regulation of the U. S. Department of Health, Education and Welfare. Your Petitioner's Brief on the Merits fully discusses the theory of an alleged implied right presumed by Respondents to exist under the Social Security Act. Therein, Petitioner concludes that such a right does not exist. Assuming arguendo that there is an implied right, it has been firmly established by this Court that an action founded on a statutory right is in the nature of an action of assumpsit. *Metropolitan Railroad Co.* v. *District of Columbia,* 132 U.S. 1, 13 (1889). Hence, unjust enrichment is a fundamental prerequisite for the enforcement of restitution, irrespective of whether the issue is one of state law or federal law. *Rankin* v. *Emigh,* 218 U.S. 27, 54 L. Ed. 915, 921 (1910).

The facts in this case are undisputed except for the Respondent's characterization of the Petitioner's action in

defending his legal position as being "willfull and wanton".[1] Official notice can be taken that each year from 1968 to 1972, every penny of the Illinois Welfare Appropriation has been disbursed to welfare recipients.[2] No

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1. *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), did not place a prohibitory injunction against the enforcement of the AABD state regulations involving the time period for processing applications. At the time of filing the complaint in the present case, the final order in *Rodriguez* had not been entered. Thereafter, Petitioner's predecessors' theory was consistent with their position in the Brief on Merits in the direct appeal to this Court in *Rodriguez*.

Now Respondents seek to imply that former Director Swank was in direct contempt of the *Rodriguez* prohibitory injunction by not enforcing the time requirements in the AABD regulations which are the subject of this Writ of Certiorari. This doubtful theory is pronounced by Respondents to support their proposition that equitable restitution is proper in this case. The wisdom and candor of this philosophy are indeed questionable. The proposition is a boot strap argument.

2. In 1973, there was a welfare appropriation surplus. The surplus arose as a result of several factors including the over-budgeting of anticipated increases in the welfare assistance rolls arising from the exhaustion of unemployment compensation benefits by displaced labor. The economic picture has changed dramatically. The impact of the fuel crisis on employment in Illinois, which contains the second largest industrial market in the United States, has been particularly extreme. As this brief goes to press, there are many announcements of job displacements in the airline, transportation, steel, auto and oil industries. Hence, there is no question but that many more families will be compelled to rely upon the Illinois wel-

funds were diverted to other governmental uses by the Illinois Department of Public Aid.

Accordingly, it is respectfully submitted that there has been no unjust enrichment of the Illinois Department of Public Aid, any of its Directors, the body politic, or the taxpayers of the State of Illinois. The body politic has not retained a single dollar of the welfare appropriation; it has not turned back any funds to the Illinois General Assembly. Nor have the taxpayers of Illinois had any of their taxes reduced. If there is unjust enrichment, it will innure to the benefit of former welfare recipients who no longer qualify for assistance. It is undisputed that some of the members of the class of welfare recipients no longer qualify for assistance.

ILLINOIS NEVER WAIVED THE ELEVENTH AMENDMENT IMMUNITY.

Respondents contend, assuming arguendo that this is a suit against the State, that Illinois has consented to the suit by its actions in defending the suit and by its failure to raise an Eleventh Amendment defense before the trial Court. Petitioner agrees that under appropriate circumstances a state can waive the protection granted by the Eleventh Amendment, but contends that waiver can be found only on grounds much more limited than implied by Respondents.

With the one exception discussed below the cases cited by Respondents involve fact situations bearing no relationship whatsoever to that of the instant case. In *Mis-*

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fare system after their statutory entitlement period for unemployment compensation benefits has been exhausted along with their private resources.

souri v. *Fiske,* 290 U.S. 18 (1933) the state was found to have waived its Eleventh Amendment immunity by having voluntarily intervened in an action as a party Defendant. In *Clark* v *Barnard,* 108 U.S. 436 (1883) in which the state intervened as a claimant of a fund under the jurisdiction of the lower Court, this Court held at 448 that the State, "thereby made itself a party to litigation to the full extent required for its (rights as a claimant to the fund) complete determination." In *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959) the interstate compact establishing the Bridge Commission and adopted by the respective state legislatures provided that the Commission had the power to sue and be sued. Further, because Congress in approving the compact had attached a condition that nothing in the compact affected, impaired, or diminished any right, power, or jurisdiction of any Federal Court over or in regard to any navigable waters or any commerce between the states, this Court held that the states had waived their Eleventh Amendment immunity. In *Gunter* v. *Atlantic Coastline R. Co.,* 200 U.S. 273 (1905) the Eleventh Amendment immunity was found to have been waived because the relief being sought was merely ancillary relief in aid of a decree in a suit in which jurisdiction as to the state and its officers had been acquired by the voluntary action of the state in submitting its rights to judicial determination.

In each of the above cases the state being sued had come before the Court voluntarily. There is no suggestion in any of the cases that the Court would have failed to recognize a valid Eleventh Amendment defense if the respective states had been brought before the Court involuntarily.

Respondents' arguments to the effect that the Eleventh Amendment immunity defense was waived even if it originally existed are no more convincing. The quotation from *Illinois Central R. Co.* v. *Adams,* 180 U.S. 28 (1901) (Respondents' brief 40) is seriously misleading since the issue before the Court was not whether the Eleventh Amendment immunity should be raised in the pleadings as opposed to being first raised on appeal, but rather the issue was whether the Eleventh Amendment immunity was properly raised by Motion.

Respondents correctly characterized the decision in *Lidie* v. *State of California,* 478 F. 2d 552 (9th Circ. 1973), but whatever the powers of the California Attorney General, it is clear that neither the Attorney General of Illinois nor any of his assistants has the power to waive the State's Eleventh Amendment immunity.

Clearly, the decision as to which individual(s) or governmental body shall be given the power to waive the State's sovereign immunity is peculiarly a question of State law rather than Federal. The long standing rule that neither the Attorney General nor his assistants has the power to waive the State's sovereign immunity, *People of the State of Illinois* v. *the Sanitary District of Chicago,* (1904) 210 Ill. 171, was not altered by the enactment of Article 13, Section IV of the Illinois Constitution of 1970 and Section 801, Chapter 127 of the Illinois Revised Statutes, 1971, enacted pursuant thereto, both of which became effective on January 1, 1972. *Chicago Welfare Rights Organization* v. *Weaver,* (1972) 5 Ill. App. 3rd 655. No authority was given to the Attorney General to waive the State's sovereign immunity.

In the absence of an express intendment of Congress under the Social Security Administration Act creating

the "alleged deprived federal right" the questions of how Illinois can waive its immunity from suit under the Eleventh Amendment, and who in Illinois can waive the protection, are clearly issues of state law. The Respondents never address themselves to the statutory intendment issue. Notwithstanding, Respondents make two points in their Brief casting doubt on the status of the law of who can waive Illinois' Eleventh Amendments Rights in Footnote 27 and again in Footnote 14, casting doubt on the application of the doctrine of sovereign immunity under the Illinois Constitutions of 1870 and 1970 and their application to the request for monetary award.

With respect to Respondents' argument that *Monroe* v. *Collins,* 393 Ill. 553, 66 N.E. 2d 670 (1946) creates a doubt as to "who can waive Illinois' right to sovereign immunity", your Petitioner is baffled as to how the *Monroe* decision relates to the decisive utterance of the Supreme Court of Illinois in *Illinois* v. *Sanitary District,* 210 Ill. 171, 71 N.E. 334 (1904) prohibiting waiver of sovereign immunity, and accordingly the Eleventh Amendment. The decision in *Illinois* v. *Sanitary District* has not been overruled expressly or *sub silento,* and its law has continued vitality as witnessed in *Powers* v. *Tealeander,* 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970), and *Chicago Welfare Rights Organization* v. *Weaver, supra.*

Respondents' comments relating to the *Chicago Welfare Rights* decision by the Illinois Supreme Court are incorrect and misleading by asserting that welfare recipients would be barred from the Courts of the State of Illinois. According to Respondents' theory, "the reasoning in *Chicago Welfare Rights Organization* v. *Weaver, supra,* has been rejected by the Illinois Supreme Court." (For purposes of convenience your Petitioner attaches hereto a

copy of the Illinois Supreme Court decision, which has not yet been published, as Appendix A.

Chicago Welfare Rights Organization contains no express language rejecting the opinion of the Illinois Appellate Court appearing at 5 Ill. App. 3rd 655 (1972). Nor is there any implied language rejecting the application of the law contained in the Illinois Appellate decision. The Illinois Supreme Court disposed of *Chicago Welfare Rights Organization* by statutory construction. The Illinois Appellate Court case still stands as good law for the decisive utterance that such actions relating to monetary awards are maintainable only in the Illinois Court of Claims. The Illinois Supreme Court decision does not foreclose this proposition.

The rationale for this approach is that the Court of Claims mechanism, established by the Illinois General Assembly more than four decades ago, provides for the specialized budgeting function of matching costs of Illinois government with its finite resources. Hence, Respondents' statement that the "decision of the Illinois Supreme Court denies a class of welfare recipients . . . a remedy of equitable restitution in Illinois courts . . ." is a mistaken impression of the law tending to create disbelief as to the application of *Employees of the Department of Health Education and Welfare, State of Missouri*, v. *Department of Public Health and Welfare, State of Missouri*, 411 U.S. 279 (1973), to the facts of this case.

As in *Employees*, the Respondent class should be directed to look to the Illinois Courts for redress of the monetary aspect of the relief that they seek. The same policy considerations are present here as in *Employees*. These considerations involve the interpretation of the

statutory intendment of the Social Security Act, and the ramifications of the Eleventh Amendment, and Article 1, Section 8 of the Constitution.

With respect to the state remedies aspect of *Employees*, Respondents have urged that their class would be afforded only a "truncated remedy" unless full relief could be awarded. Hence they seek the extension of the parameters of the fiction of *Ex Parte Young, supra.*

The limitations of the parameters of the doctrine of *Ex Parte Young* cause no injury, though possibly some inconvenience. Courts have historically countenanced such inconvenience in denying class actions in which the operative facts with regard to each member of the purported class were different, *Hercules* v. *Minnesota Highway Department,* 337 F. Supp. 795 (D.C. Min. 1972). This principle of law has application to the present case because the operative facts of each member of this class are distinct and different. This is evident when viewed from the focal point of the expressed intendment of Congress that welfare assistance be granted only to provide funds for present need. The issue of present need is a fact question that is different for every member of the class.

The Illinois Appellate Court's decision in *Chicago Welfare Rights Organization* v. *Weaver, supra* provides the rationale for harmonizing the two competing policy considerations that are involved in the funding of retroactive assistance. The two policy considerations are the right to redress, assuming arguendo an implied right in the Social Security Act, and the right of the State to preserve the integrity of the State budgetary process. In the Court of Claims each applicant files a complaint for retroactive assistance and a separate fact hearing is held. No constitutional rights are impaired by this process.

RESPONDENTS' CITATIONS UNDER THE RECONSTRUCTION AMENDMENTS CAN BE HARMONIZED WITH A FINDING THAT THE ELEVENTH AMENDMENT PROHIBITION LIMITS THE JUDICIAL RELIEF AVAILABLE TO THE RESPONDENTS.

Respondents urge that their rights are redressable under 42 U.S.C. Section 1983. Since the Civil Rights Act is an extension of the Reconstruction Amendments adopted after the Civil War, it necessarily follows, they argue, "that the Eleventh Amendment prohibition has been abrogated."

However, a close analysis of Title 42 U.S.C. 1983 belies this assertion. Section 1983 only provides claimants with a right to redress claims against Dependants who "subject, or cause to be subjected any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ." Section 1983 does not create by its own terms a substantive right to welfare assistance. Rather it is necessary to look to the statute creating the substantive right to assistance. Without the Social Security Act, there would be no right to assistance.

Petitioner stresses that the record herein does not involve a deprivation of equal protection of the laws. The issue was decided by motion and upon the application of the Supremacy of the Laws Clause of the Constitution. The decision of the District Court was consistent with the holdings of this Court that the substantive rights of welfare recipients are predicated specifically on provisions

of the Social Security Act. *Rosado* v. *Wyman*, 397 U.S. 397 (1970) and *Townsend* v. *Swank*, 404 U.S. 282 (1971).

Accordingly, it is respectfully submitted that the focal point of analysis is the issue of whether the Social Security Act created a right to retroactive assistance. If so, the next issue to be addressed is whether the application of the supremacy clause must be read in *para materia* with the Eleventh Amendment prohibition. It is respectfully submitted that the Supremacy Clause only establishes priorities of law. Since the Social Security Act was predicated upon powers of the Federal government to levy taxes, it necessarily follows that there is no implied consent to suit when Illinois participated in federally funded welfare programs. The doctrine of implied consent is predicated upon legislation enacted under the Commerce Clause. *Employees, supra* (concurring opinion of Justice Marshall).

Nor does the record establish any express consent. The Supremacy Clause ought not necessarily give rise to any greater power than that committed to Congress permitting it to enact the Social Security Act.

With respect to the legislative history of the Social Security Act, Petitioners direct the Court's attention to *Steward Machine Company* v. *Davis*, 301 U.S. 548 (1936), discussing the relationship of Article I, Section 8, of the Constitution to the right of the federal government to lay and collect duties, imports, and excises.

Hence, the analysis of the relationship between the Commerce Clause and the Eleventh Amendment discussed in *Employees* and developed in Mr. Justice Marshall's concurring opinion has no application to this case.

Accordingly, the analysis of the Respondents urging the finding of law that the enabling legislation under the Fourteenth Amendment abbrogates the prohibition contained in the Eleventh Amendment must fall.

RESPONDENTS HAVE CREATED A "STRAW MAN" ARGUMENT IN CHARACTERIZING PETITIONERS' THEORY AS BEING THAT ANY SUIT WHICH HAS AN IMPACT ON THE STATE TREASURY IS BARRED BY THE ELEVENTH AMENDMENT.

Petitioner argues in his brief at page 29 that "a suit seeking a monetary award from the fisc of a local body politic is a suit against the State barred by the Eleventh Amendment." Respondents have set up a "straw man" by characterizing Petitioner's position as "equitable relief which has an impact on the State Treasury" is barred by the Eleventh Amendment. This "straw man" is then knocked down by Respondents by citing cases that in substance are not responsive to the gist of your Petitioner's theory.

The cases cited by Respondents do involve claims brought against public officials in which the relief ultimately granted had an "impact" on the State Treasury. However, Respondents cite no case in which a monetary award to be paid from the State Treasury for an alleged violation of a derivative statute was upheld over Eleventh Amendment objections. The reapportionment cases cited by Respondents all involved violations of the requirements set forth in Article 1, Section 2 of the Constitution rather than statutory violations. The likelihood that the States involved would incur expenses as a result of the Court's injunctive and declaratory relief was mere-

ly incidental. In *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala. 1972), the District Court awarded substantial costs and attorneys fees against individual state officers after determining that the decision to award said fees had lost much of its discretionary character due to the long standing failure of the state officials to carry out their constitutional obligations to reapportion.

Likewise, the numerous cases cited by Respondents arising out of various "welfare" programs all involved violations of constitutionally guaranteed equal protection and/or due process. *Graham* v. *Richardson,* 403 U.S. 365 (1971) ordered the granting of declaratory and injunctive relief for welfare benefits wrongfully withheld from aliens in violation of equal protection guarantees. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) granted relief after finding violations of constitutional guarantees to equal protection and due process. In affirming *Thompson* v. *Shapiro,* 270 F. Supp. (D.C. Conn. 1967) the Court upheld an award of "damages"; the two companion cases did not involve awards of damages. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) involved an award of declaratory and injunctive relief in the face of a violation of procedural due process requirements.

Vlandis v. *Kline,* 409 U.S. 1036 (1973) sustained relief to the Plaintiff on the grounds that a Connecticut law preventing students in state universities from gaining the benefits of lower tuition rates for in-state citizens by becoming Connecticut citizens after application for admission to state universities was unconstitutional denial of due process. The Court provided for equitable resitution of excess tuition wrongfully collected by the State. Equitable restitution was clearly applicable here, since to allow Connecticut to keep the excess tuition would have been unjust enrichment of the State.

Two of the cases cited by the Respondents are best characterized as "racial discrimination" cases. *Cook* v. *Davis,* 178 F. 2d 595 (5th Cir. 1949), *Cert. denied,* 340 U.S. 811 (1950) found salary discrimination against Negro teachers to be a denial of due process and equal protection. But, in denying an Eleventh Amendment objection, the Court found at 599 "nothing was sought to be recovered against the State, nor is any right of the State sought to be impaired." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 did give the lower Court the widest degree of latitude in providing equitable relief including the power to order the school board to levy taxes to maintain schools. Nevertheless, in rejecting an Eleventh Amendment argument in this case involving violations of equal protection guarantees, the Court specifically held at 228, "that suits against the state and county officials to enjoin them from invading *constitutional rights* (emphasis added) are not forbidden by the Eleventh Amendment."

Respondents' characterization of *Osborn* v. *Bank of United States,* 22 U.S. (9 Wheat) 738 (1824) and *Perez* v. *Ledesma,* 401 U.S. 82 (1971), are both misleading. In *Osborn* the Defendant was ordered to repay money collected by him as a tax for the State of Ohio after the District Court had specifically enjoined him from collecting the tax. The sovereign immunity argument was raised by the state official only after the injunction had been issued and violated. Chief Justice Marshall upheld the power to issue the injunction against the state officials even though they were acting as agents for the State of Ohio, which could not be made a party Defendant. The power of the Court to order restitution of the taxes collected after the entry of the injunction was nothing more

than the use of the inherent power of the Court to return the parties to the position they occupied at the time of the entry of the injunction.

The quote from Mr. Justice Brennan in *Perez* is taken not from a concurring opinion but from the dissent portion of an opinion concurring in part and dissenting in part. The cited portion was taken out of context from a more lengthy discussion of the Court's efforts to balance the Eleventh Amendment against rights and powers secured elsewhere in the Constitution, which discussion began at 104.

Finally, Respondents cite cases brought by or on behalf of prisoners or individuals committed to mental health institutions. In each case the Court denied the Eleventh Amendment arguments, but again, only in the face of violation of the Plaintiffs' constitutional rights, including rights under the Eighth Amendment.

It is clear then, as stated in *Holt* v. *Sarver,* 442 F. 2d 304, 306 (8th Circ. 1971) that "the State has no power to impart to him (the state official being sued) any immunity from responsibility to the supreme authority of the United States (the Constitution)". There is no doubt that forced to choose between granting relief against a violation of an individual's constitutional rights and the sovereign immunity of the state as guaranteed by the Eleventh Amendment, the Courts have consistently chosen to enforce the individual's rights by restricting the scope of the Eleventh Amendment, but Respondents cite no case, nor have any been found by Petitioner in which a mere statutory right has been allowed to take precedence over the provisions of the Eleventh Amendment.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request this Court to reverse the judgment of the court below.

Respectfully submitted,

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DATE: December 7, 1973

APPENDIX A

OPINION

SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } SS.

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday the tenth day of September in the year of our Lord one thousand nine hundred and seventy-three, within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, ATTORNEY GENERAL
WILLIAM G. LYONS, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

BE IT REMEMBERED, *that afterwards, to-wit, on the 25th day of September, 1973 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:*

Chicago Welfare Rights Organization, a not-for-profit corporation, et al., etc., et al.,
Appellants,
No. 45253
vs.
Edward T. Weaver, as Successor to Harold O. Swank, Director, Illinois Department of Public Aid; et al., etc.,
Appellees.
} **Appeal from Appellate Court First District**

JUSTIN TAFT
Clerk of the Supreme Court
State of Illinois

Docket No. 45253—Agenda 13—May, 1973

CHICAGO WELFARE RIGHTS ORGANIZATION, *et. al.*, Appellants, v. EDWARD T. WEAVER et al., Appellees.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This case is here on leave granted to appeal from a judgment of the Appellate Court, First District (5 Ill. App. 3d 655), which reversed a judgment of the circuit court of Cook County. The substantive issue in the case concerned the correctness of the determination of the Director of the Department of Public Aid as to the maximum shelter allowance payable under the program of Aid to Families with Dependent Children (AFDC). The circuit court ruled that the Director had ultimately determined the maximum shelter allowance correctly, but that he had unlawfully delayed in doing so. The court therefore ordered the defendants, the Director, the Auditor of Public Accounts, and the State Treasurer, to pay to recipients under the program the benefits which would have been payable but for the Director's unlawful delay in increasing the maximum allowance. Both the defendants and the plaintiffs appealed. The appellate court reversed the judgment and dismissed the cause, on the ground that the circuit court lacked jurisdiction because "the plaintiffs should have brought their suit in the Court of Claims." (5 Ill. App. 3d 655, 660 (1972).) For the reasons stated below, we affirm.

In order to understand the problems presented, an explanation of the Federal and State statutory schemes is necessary. The Social Security Act established the Aid to

Families with Dependent Children program. Section 401 of that statute provides: "The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary [of the Department of Health, Education, and Welfare], State plans for aid and services to needy families with children." (42 U.S.C. sec. 601.) Section 402 states the elements necessary to qualify a plan for Federal funding and directs the Secretary to approve any plan which fulfills those conditions. (42 U.S.C. sec. 602.) Illinois has adopted a plan for which it receives Federal payments under this statute. Ill. Rev. Stat. 1969, ch. 23, par. 4—1 *et seq.*

In 1968 Congress added the following new requirement, hereafter referred to as section 402(a)(23):

> "*** that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adadjusted." Pub. L. 90—248, sec. 213(b), 81 Stat. 898; 42 U.S.C. sec. 602(a)(23).

The Illinois statute authorizes the Department to:

> "Establish standards by which need for public aid will be determined and amend such standards from time to time as circumstances may require." Ill. Rev. Stat. 1969, ch. 23, par. 12—4.11.

The statute continues:

> "The standards shall provide a livelihood compatible with health and well-being for persons eligible for financial aid under any Article of this Code. They shall include recognition of any special needs ***.

> The quantity and quality of the items included in the standards established for food, clothing, and other basic maintenance needs shall take account of the buying and consumption patterns of self-supporting persons and families of low income, as determined from time to time by the United States Department of Agriculture, the United States Bureau of Labor Statistics, and other nationally recognized research authorities in the fields of nutrition and family living.
>
> The items in the standards shall be priced periodically for changes in cost, as provided in Section 12—4.15, and allowances adjusted as indicated by the findings of such surveys.***
>
> In establishing a standard for shelter, the Department shall take in account in each community the prevailing rates or costs for housing of low income persons and the factors which influence the level of such rates or charges. However, the shelter standard for any recipient, exclusive of household furniture and utilities, shall not exceed $90 per month, except for adjustments made in the manner authorized by Section 12—14." Ill. Rev. Stat. 1969, ch. 23, par. 12—4.11.

The Illinois statute thus provides separately for various expenses, and requires periodic adjustment in the allowance for some items to reflect increases in the cost of living. (*Cf.* Ill. Rev. Stat. 1969, ch. 23, par. 4—2.) Apparently the requirement of section 402(a)(23) was met as to those items, and they are not involved in this lawsuit. The problem centers upon the statutory maximum of $90 for shelter allowance.

The Illinois statute authorizes adjustments in the $90 maximum "in the manner authorized by Section 12—14." That section provides for a "Legislative Advisory Committee on Public Aid" to be composed of six members of the House of Representatives and six members of the Senate, and further provides:

> "When limitations are imposed by this Code or by any other law on grants to recipients of public aid, the Illinois Department may authorize deviations from such limitations only after prior notice to and consultation with the Committee. If two-thirds of the membership of the Committee determine as a matter of policy that deviations from such limitations should or should not be made, the Illinois Department shall give substanial consideration to such determination." Ill. Rev. Stat. 1969, ch. 23, par. 12—14.

Of course the $90 maximum could have been adjusted by amending the statute, but the legislature did not do so before the July 1, 1969, deadline set by section 402(a)(23) and has not yet done so.

Despite the statutory maximum, many Illinois AFDC families received more than $90 per month for shelter because the Department of Public Aid, acting pursuant to section 12—14, had from time to time established a specific number of authorized "exceptions." At all times the number of authorized "exceptions" substantially exceeded the number of recipients who needed more than $90. *Cf. Metcalf* v. *Swank,* 293 F. Supp. 268 (N.D. Ill. 1968), 305 F. Supp. 785 (N.D. Ill. 1969), *aff'd,* 444 F. 2d 1353 (7th Cir. 1971), *vacated and remanded,* 406 U.S. 914, 32 L. Ed. 2d 113, 92 S. Ct. 1778, 1972).

The Illinois Department contended that this administrative practice constituted compliance with section 402 (a)(23). The Federal Department of Health, Education, and Welfare (HEW) rejected this contention. Considerable correspondence and negotiation followed. In May of 1970, following a meeting with the Legislative Advisory Committee, the Illinois Department of Public Aid (IDPA) announced its intention to increase the maximum shelter

allowance to $95 to take account of increased costs during the period from July 1967 to January 1970. This increase became effective July 1, 1970. In July, 1970, the Chicago Welfare Rights Organization, a plaintiff in this case, wrote to HEW alleging, in part, that the increase was improperly computed. On August 18, 1970, HEW notified the Illinois Department that the adjustment must reflect changes in costs since August, 1963, when the $90 maximum was enacted by the legislature, and that "the period September 1, 1963, to July 1, 1969 would be [an] acceptable measuring period." On August 22, 1970, this action was filed. On August 27, 1970, the Illinois Department increased the shelter allowance maximum to $97.

It is against this statutory and administrative background that the procedural issues with which we shall be primarily concerned arise. Three of the plaintiffs, Ernestine Hollins, Doris Johnson, and Alberta Lee, are mothers of dependent children who sue on their own behalf and on behalf of other individuals similarly situated. Each of them was required to, and did, pay shelter rent in excess of $90. The plaintiff, Chicago Welfare Rights Organization, is described as "an unincorporated association of some 20 welfare rights organizations in the Chicago area representing approximately 3000 families receiving public assistance benefits." The plaintiff, Southside Concerned Subsidized Parents, is described as "an unincorporated association of some 300 families living on the south side of Chicago who receive public assistance benefits."

In view of the disposition that we make of these cases, we find it unnecessary to consider the standing of these two organizations to maintain this action. The three individual plaintiffs assert their own rights and those of the

members of a class whom they purport to represent, and they are proper parties. The primary relief that they seek is a mandatory injunction to compel the defendants to pay to the plaintiffs the amounts to which they claim to be entitled, as well as money judgments for any amounts that had been improperly withheld or denied. The appellate court centered its attention upon the latter claim, and held that it could be asserted only in the Court of Claims. In our opinion the appropriate focus is upon the failure of the plaintiffs to invoke the administrative remedies available to them.

Although section 12—4.11 states a fixed maximum shelter rent allowance, it also authorizes shelter allowances in excess of that maximum by way of administrative adjustments. The Department has consistently exercised its authority to make administrative changes in individual shelter rent allowances, and it has by administrative action increased the maximum applicable to all cases beyond the $90 limit still stated in the statute.

Section 11—8.7 provides that judicial review of administrative decisions of the Department shall be governed by the Administrative Review Act. (Ill. Rev. Stat. 1969, ch. 23, par. 11—8.7.) The Administrative Review Act provides:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed ***." Ill. Rev. Stat. 1969, ch. 110, par. 265.

We see nothing in the facts of this case that would justify a disregard of this plain provision. If this action can be maintained in the face of the statutory prohibition, it is difficult to conceive of any area in which the Administrative Review Act can operate. *Cf. People ex rel. Chicago and North Western Ry. Co.* v. *Hulman,* 31 Ill. 2d 166 (1964); *Johnson* v. *Ogilvie,* 47 Ill. 2d 506 (1970).

Our conclusion is not altered by the circumstance that the plaintiffs stated their claim in two counts, one based upon the State law and the other upon the Federal Civil Rights Act of 1871 (42 U.S.C. sec. 1983). Both counts alleged the same facts and sought the same relief. It has been held that there is no requirement that administrative remedies be exhausted when a State welfare plan is challenged under section 1983 in a Federal court. (*Carter* v. *Stanton,* 405 U.S. 669, 31 L. Ed. 2d 569, 92 S. Ct. 1232 (1972); *Damico* v. *California,* 389 U.S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967).) In *Damico* the United States Supreme Court stated:

> "The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.' This was error. In *McNeese* v. *Board of Education,* 373 U.S. 668, noting, that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have,' *id.,* at 672, we held 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy,' *id.,* at 671. See *Monroe* v. *Pape,* 365 U.S. 167, 180-183." 389 U.S. at 416-17, 19 L. Ed. 2d at 648.

The fact that a Federal district court would take jurisdiction of an action of this kind neither requires nor

justifies the courts of this State in doing so. The Supreme Court of the United States said in *Rosado* v. *Wyman*, 397 U.S. 397, 422, 25 L. Ed. 2d 442, 461, 90 S. Ct. 1207 (1970):

> "While we view with concern the escalating involvement of federal courts in this highly complicated area of welfare benefits, one that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field."

The situation is not the same insofar as Illinois courts are concerned. The governing statute provides for administrative review at the instance of individual applicants or recipients, and it provides that administrative decisions shall be judicially reviewable under the Administrative Review Act. Illinois provided a remedy for the grievances that the plaintiffs assert, but they did not choose to pursue it.

In our opinion the fact that the General Assembly had made available an administrative remedy, followed by judicial review, negatives the conclusion of the appellate court that plaintiffs' only remedy was by a proceeding in the Court of Claims.

For the reasons stated in this opinion, the judgment of the appellate court dismissing the action is affirmed.

Judgment affirmed.